90-912

Supreme Court, U.S.
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No. 90-___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

ZETTA C. FARRIS,

PETITIONER,

V.

OFFICE OF PERSONNEL MANAGEMENT,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err when it affirmed the Merit Systems Protection Board's interpretation of 5 U.S.C. § 8339 that Mrs. Farris was not entitled to receive a survivor annuity even though Mr. Farris had elected a survivor annuity for his widow at retirement?

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OPINIONS BELOW

The opinion of the Court of Appeals (App. at 1) is unreported. The opinion of the Merit System Protection Board is unreported (App. at 2-4). The opinions of the Office of Personnel Management are also unreported (App. at 5-7).

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AUTHORITY TO BE INTERPRETED

5 U.S.C. § 8339(j)(5)(C)(i) (1984) states, in pertinent part:

> (C)(i) Upon remarriage, a retired employee or Member who was married at the time of retirement . . . . may irrevocably elect during such marriage, in a signed writing received by the Office within 2 years after such marriage . . . . . a reduction in the employee or Member's annuity under paragraph (4) of this subsection for the purpose of providing an annuity for such employee or Member's spouse in the event such spouse survives the employee or Member.

U.S. Const. amend. V states, in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

Ralph J. Farris was a civil service employee of the Veterans' Administration for many years. He retired from federal service on January 16, 1981. He was married at the time of his retirement. Upon retirement, he elected a survivor annuity with "benefit to widow or widower." Mr. Farris' first wife died in 1986.

On August 13, 1987, Mr. Farris married Zetta Farris, the petitioner in this case. Mr. Farris told Mrs. Farris that he had elected a survivor annuity when he retired and that, if he died, Mrs. Farris would receive payments equal to 55 percent of his annuity payments. On March 16, 1989, Mr. Farris died.

Mrs. Farris filed an application for death benefits with the Office of Personnel Management (OPM) on March 30,

1989. Sometime shortly after April 18, 1989, Mrs. Farris called OPM to determine the status of her application. After several telephone calls to OPM, Mrs. Farris was told by Dorothea Harris, a Claims Examiner at OPM, that the application had been approved, that Harris had "personally walked it through," and that Ms. Farris would receive $900.00 a month after she made the required deposit.

Soon afterward, Ms. Farris received a telephone call from Thelma Tabb, another Claims Examiner at OPM. Tabb told Ms. Farris that she would not be receiving an annuity. By a letter from Tabb on June 23, 1989, OPM disallowed Mrs. Farris' request for a survivor annuity. Mrs. Farris requested a reconsideration of that decision, and OPM affirmed its decision in a reconsideration opinion of July 24, 1989.

The sole basis for OPM's denial of Mrs. Farris' application for a survivor annuity is the agency's finding that Mr. Farris did not elect a survivor annuity within 2 years of

his remarriage. According to 5 U.S.C. § 8339(j)(5)(C)(i), a retired annuitant must elect a survivor annuity for a new spouse within two years of marriage. The section reads:

> (C)(i) Upon remarriage, a retired employee or Member who was married at the time of retirement . . . . may irrevocably elect during such marriage, in a signed writing received by the Office within 2 years after such marriage . . . . . a reduction in the employee or Member's annuity under paragraph (4) of this subsection for the purpose of providing an annuity for such employee or Member's spouse in the event such spouse survives the employee or Member.

5 U.S.C. § 8339(j)(5)(C)(i). It is true that Mr. Farris did not elect a survivor annuity within two years of his remarriage. However, Mr. Farris died before the two year period ended. 5 U.S.C. § 8339(j)(5)(C)(i) does not address the procedure for applying for a survivor annuity when the annuitant dies before the 2 year application period has ended, but OPM interpreted the statute to mean that Mr. Farris' death terminated the application period. As a result, OPM did not accept Mrs. Farris' application for the survivor annuity.

Mrs. Farris, by counsel, filed a Petition for Appeal with

the Merit Systems Protection Board (MSPB) on August 16, 1989. On September 18, 1989, Mrs. Farris filed interrogatories, requests for production of documents, and notices of depositions with OPM as allowed by 5 C.F.R. §§ 1201.71-1201.74. OPM failed to comply with any of the requests for discovery. Mrs. Farris filed a Motion to Compel Discovery on October 4, 1989 and Motions for Sanctions or, Alternatively, to Compel Discovery, on September 25, 1989. The MSPB administrative judge held a hearing on the discovery motions on October 5, 1989, and made a finding of fact that OPM had not complied with the discovery requests. The judge ordered OPM to provide Mrs. Farris with its file on her case, but he did not impose sanctions on OPM. Mrs. Farris' counsel objected to the Board's order in a letter to the Board on October 5, 1989.

A telephone conference hearing was held on October 19, 1990; a transcript of that hearing is attached in the Appendix to this brief. The MSPB affirmed the OPM decision on

November 7, 1989. The MSPB order became final on December 12, 1989. Mrs. Farris appealed the decision of the MSPB to the U.S. Court of Appeals for the Federal Circuit, which had jurisdiction over the appeal pursuant to 5 U.S.C. § 7703. The Court of Appeals affirmed the MSPB decision by order on August 11, 1990.

ARGUMENT

I. OPM and the MSPB Erred By Holding that Mr. Farris Did Not Elect a Survivor Annuity.

OPM disallowed Mrs. Farris' application for a survivor annuity because the agency construed 5 U.S.C. § 8339(j)(5)(C)(i) to mean that "the law allows certain retired employees who were married when they retired to take a reduction in annuity in order to provide a survivor annuity for a spouse acquired after retirement." App. at 7.

However, Mr. Farris is not a member of the class of retirees who was required to elect a survivor annuity for his widow because Mr. Farris had already elected a survivor annuity for his widow when he retired. The fact that he was

married to a different women at the time of his election and at the time of his death does not disqualify the later-acquired wife from the elected survivor annuity. 5 U.S.C. § 8339(j)(5)(C)(v) states that:

> An election to provide a survivor annuity to a person under this subparagraph . . . (II) shall, if an election was made by the employee or Member under subsection (k)(1) [which allows a retiree to designate a beneficiary by name] with respect to a different person, prospectively void such election if appropriate written application is made by such employee or Member at the time of making the election under this subparagraph.

Mr. Farris did not elect a beneficiary of his survivor annuity by name with a written application at the time of making the election. Thus, his survivor annuity attached to his widow, whomever she might have been in the future, at the time of election.

This principle was clearly stated in *Burrell v. OPM*, 33 M.S.P.R. 546 (1987), where the facts were similar to those in this case. The retiree had elected a survivor annuity when he retired. He then divorced his first wife and married a second wife. When he died, his first wife applied for an

annuity because (1) she was married to the retiree at the time he made his election and (2) the retiree did not designate the second wife as the beneficiary of the survivor annuity. The MSPB held that the current widow is the person eligible for an elected survivor annuity, even though the retiree did not file a form with OPM designating his new spouse as the beneficiary. The Board wrote:

> The appellant correctly asserts that there is no form in the record showing that Mr. Burrell designated his current spouse to receive a survivor annuity in the event of his death. Contrary to OPM's implication in the reconsideration decision, however, Mr. Burrell was not required, on remarriage, to "elect" a survivor annuity for his current spouse and he was not required to submit a new designation form for his current spouse in order for her to be eligible for survivor benefits.

33 M.S.P.R. at 549. There is no question that Mrs. Farris would be entitled to an annuity if the Board's analysis in *Burrell* is applied to this case. However, the decision rule in *Burrell* was that the law at the time of the annuitant's retirement must be applied in determining survivor annuity issues. 33 M.S.P.R. at n. 5.

Thus, this case may be resolved by determining what the law of survivor annuities was at the time of Mr. Ferris' retirement in 1981. In 1981, 5 U.S.C. § 8341(b)(1) read:

> Except as provided in paragraph (2) of this subsection, if an employee or Member dies after having retired under this subchapter and is survived by a spouse to whom he was married at the time of retirement, or by a widow or widower whom he married after retirement, the spouse, widow, or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of an annuity computed under Section 8339(a)-(i) and (n) of this title as may apply with respect to the annuitant, or of such portion thereof as may have been designated for this purpose under Section 8339(j) of this title, unless the employee of Member has notified the Commissioner in writing at the time of retirement that he does not desire any spouse surviving him to receive his annuity, or in the case of remarriage, he did not file an election under the third sentence of Section 8339(j) of this title.

In 1981, the third sentence of 5 U.S.C. § 8339(j) read:

> Upon remarriage, the retired employee of Member may irrevocably elect during such marriage, in a signed writing received by the Office within 1 year after such marriage a reduction in the employee or Member's annuity for the purpose of providing an annuity for such employee of Member's spouse in the event such spouse survives the employee or Member.

In 1981, the statute did not state that a member who had already elected a survivor annuity was required to re-elect a survivor annuity if he remarried; rather, the plain language of the statute merely required the retired employee who had *not* elected a survivor annuity at the time of retirement to elect a survivor annuity within one year of remarriage if he wished to start an annuity for his spouse.[1]

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[1] In 1984, Congress changed 5 U.S.C. § 8341(b)(1) to delete that language " . . . unless the employee of Member has notified the Commissioner in writing at the time of retirement that he does not desire any spouse surviving him to receive his annuity, or in the case of remarriage, he did not file an election under the third sentence of Section 8339(j) of this title." In its place, Congress added: ". . . or, in the case of remarriage, the employee or Member did not file an election under section 8339(j)(5)(C) or section 8339(k)(2) of this title, as the case may be." Further, 5 U.S.C. § 8339(j)(5)(C)(i), the statute OPM applied here, was amended. The language "[u]pon remarriage, a retired employee or Member who was married at the time of retirement (including an employee or Member whose annuity was not reduced to provide a survivor annuity for the employee or Member's spouse or former spouse as of the time of retirement) may irrevocably elect during such marriage, in a signed writing received by the Office within 2 years after such remarriage . . . ." replaced the language allowing 1 year for such an election. The 1984 statute applies to retirees remarried on or after February 27, 1986. However, the new language does not state that survivor annuities which were elected at the time of retirement are terminated upon remarriage; it merely states that new

Thus, the law that was applied in *Burrell* may be applied in this case. When Mr. Farris retired, he elected a survivor annuity, and his annuity was reduced while his first wife was alive. When she died, his reduced annuity ceased. When he remarried, he was not required to re-elect a survivor annuity, since the survivor annuity was already in place, but he should have notified OPM that he had remarried so that his annuity could be reduced. However, his failure to notify OPM that he had remarried is not a bar to Mrs. Farris' receiving the survivor annuity, even under the version of the statute applied by OPM in this case. The court held as much in *Burrell*, when it wrote:

> The statute, as amended in 1986, does not require that the surviving spouse be "designated," the only requirement is that (s)he be entitled to a survivor annuity . . . . The existence of a surviving spouse, who is eligible for a survivor annuity in the event of the death of the appellant's former husband, defeats the appellant's entitlement.

33 M.S.P.R. at 550.

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survivor annuities must be elected within 2 years of remarriage.

The fact that Mr. Farris elected a survivor annuity makes this case unique among the reported survivor annuity cases. In *Schweikert v. OPM*, MSPB Docket No. PH08318810254 (July 19, 1988), *aff'd*, 39 M.S.P.R. 306 (1988), the retiree had affirmatively elected to terminate his survivor annuity. *Smith v. OPM*, 25 M.S.P.R. 643 (1985); *Yarbrough v. OPM*, 770 F.2d 1056 (Fed.Cir. 1985); *Darsigny v. OPM*, 787 F.2d 1555 (Fed. Cir. 1986); *Cheeseman v. OPM*, 791 F.2d 138 (Fed. Cir. 1986), involved retirees attempting to make elections after the limitation period for making an election expired. However, this case involves a retiree who made an election for his widow at the time of retirement and a wife who made an election within the 2 year period.

The MSPB hearing officer rejected these arguments. He concluded as follows:

> . . . in 1978 Congress eliminated the automatic survivor annuity for a post retirement (second) spouse where a survivor annuity had been elected for the (first) spouse at retirement. Additionally, the two year election period applies to a person who regardless of when retired, married the post

retirement spouse after February 26, 1986.

MSPB Order at 4-5. The MSPB officer's analysis is literally correct: as pointed out above, Congress did eliminate the automatic survivor annuity for second marriages in 1978. But the 1978 law also provided for a 2 year election period. Mr. Farris did not receive full benefit of the election period because he died. Thus, his original election of a survivor annuity, which was the only affirmative manifestation of his intent, should be given consideration, and a presumption should be made that Mr. Farris intended to elect a survivor annuity. The factual record below certainly supports such an inference: Mrs. Farris testified that Mr. Farris intended to create a survivor annuity for her and OPM presented no evidence to contradict that claim.

Although there is a detailed statute governing the application for survivor annuities in general, there is no statutory language governing the application of the law to spouses in Mrs. Farris' situation. OPM has adopted a rule

which has no rational basis. An alternative rule, which would allow Mrs. Farris to elect a survivor annuity in lieu of her dead husband, would have a rational basis: it would implement Congress' intent to provide retired federal employees and their spouses income security and it would solve the fairness problems which the OPM interpretation creates.

II. The Rejection of Mrs. Farris' Election Violates Procedural Due Process.

When OPM denied Mrs. Farris the opportunity to make an election for the survivor annuity on behalf of her husband, the agency violated Mrs. Farris' rights under the Fifth Amendment. The Fifth Amendment to the U.S. Constitution provides that the government may not take property without the due process of law. U.S. Const., Amend. V.

Under 5 U.S.C. § 8331, Mr. Farris had a vested property interest in a survivor annuity for his widow because he had made the required contributions, he had retired, and he had

elected a survivor annuity at retirement. *See, Ganse v. United States*, 376 F.2d 900 (Ct.Cl. 1967). At the time he retired, he elected an annuity for his widow, whomever she might be, and his pension payments were reduced in order to provide for that survivor annuity. Although the reduction was halted after his first wife died, he and his spouse still had an interest in the money which he had contributed to the survivor annuity. When Mr. Farris died without having the full 2 year opportunity to reclaim the survivor annuity, the Farris' property interest in the past contributions was taken without due process of law. More importantly, the right to reclaim the survivor annuity within two years, a right which was granted by Congress, was taken.

This is particularly unfair since Congress provided a mechanism for curing any defects in survivor annuity elections. Subparagraph (ii) of 5 U.S.C. § 8339(j)(5)(C), the paragraph immediately following the paragraph applied by OPM in this case, reads:

> Such election and reduction shall be effective the first day of the second month after the election is received by the Office, but not less than 9 months after the date of the remarriage, and the retired employee or member shall, within 2 years after the date of the remarriage or, if later, the death or remarriage of the former spouse (or of the last such surviving former spouse), deposit in the Fund an amount determined by the Office of Personnel Management, as nearly as may be administratively feasible, to reflect the amount by which the annuity of such retired employee or Member would have been reduced if the election had been in effect since the date of retirement or, if later, the date the previous reduction in such retired employee or Member's annuity was terminated under subparagraph (A) or (B) of this paragraph, plus interest. For the purposes of the preceding sentence, the annual rate of interest for each year during which an annuity would have been reduced if the election had been in effect on and after the applicable date referred to in such sentence shall be 6 percent.

Thus, Mrs. Farris should have been able to cure the failure of her husband to have his annuity reduced by making a deposit equal to the amount that would have been deducted from his annuity if he had notified the agency of his remarriage. It is important to note that this is precisely the same conclusion that Mrs. Dorothea Harris, the OPM

representative that handled Mrs. Farris' file, initially reached in this case.

OPM's failure to allow Mrs. Farris to file the election on behalf of her dead husband, pay a deposit to cover the amount of money that would have been taken from his annuity after his remarriage, and then receive a survivor annuity was unfair.

The test for determining whether it is fair to deny due process protection was articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). The *Eldridge* test requires that a court balance the interests of the person affected by state action and the probable value of procedural safeguards against the interest of the government in not providing the safeguards.

In this case, *Eldridge* balancing clearly favors Mrs. Farris. She was denied the opportunity to make an election and pay a deposit, as allowed by the statute. The protection such a procedure would have given her would have been great; the procedure would have allowed her the survivor annuity which

she is otherwise denied. On the other hand, the government's interest in this case is small. On an individual basis, the government is only exposed to paying Mrs. Farris a stream of income which would be fully purchased by premium payments from two sources: the reduction in Mr. Farris' annuity through 1986 and the deposit paid by Mrs. Farris for the period after the remarriage.

Even viewed from a precedential and societal perspective, the government's interest in this type of case is small. If the government is required to allow Mrs. Farris to make an election, pay a deposit, and receive an annuity, only a small group of new potential applicants would be created. The only new people who could make an election are those widows and widowers whose deceased spouses: (1) died within two years of remarriage; and (2) did not make an election of survivor annuity before they died. When Mrs. Farris' interest is weighed against the government's interest, fairness dictates that Mrs. Farris be accorded the right to

elect the annuity, pay the deposit, and receive the benefits.

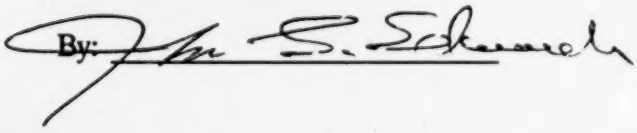
This case does not present an issue about which different Circuit Courts have reached different decisions. Survivor annuity cases are usually decided only by the Court of Appeals for the Federal Circuit. This case does present a compelling set of facts which cry out for an opinion that OPM's interpretation of the statute as to the class of widows like Mrs. Farris is plain error and violates the Fifth Amendment.

CONCLUSION

A writ of certiorari should be granted in this case.

Respectfully Submitted,

ZETTA C. FARRIS

By: 

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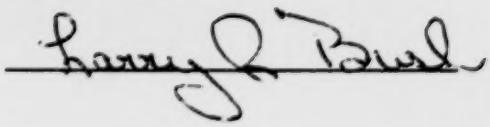
CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of this corrected Petition were sent by first class U.S. mail to Steven A. Hemmat at Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 20530, this 10th day of December 1990.



APPENDIX

Note: This judgment is not accompanied by an opinion prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 90-3099

ZETTA C. FARRIS, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

JUDGMENT ON APPEAL from the Merit Systems Protection Board in CASE NO(s) PH08318910502

This CAUSE having been considered it is ORDERED and ADJUDGED: PER CURIAM (ARCHER, PLAGER and CLEVENGER, Circuit Judges): AFFIRMED. Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

DATED August 10, 1990

Francis X. Gindhart, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

ZETTA C. FARRIS, individually,
and as personal representative of
Ralph J. Farris, deceased.

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA #1 826 306)

DOCKET NUMBER PH08318910502

DATE: November 7, 1989

Gary M. Bowman, Esquire, Martin, Hopkins, Lemon and Carter, P.C., Roanoke, Virginia, for the appellant.

Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

William F. Curtin
Administrative Judge

INITIAL DECISION

The appellant timely appealed from the Office of Personnel Management's (OPM) July 24, 1989 reconsideration decision that found that she was not eligible for survivor annuity benefits based on the Federal service of Ralph J. Farris, deceased. The appellant requests that she be awarded a survivor annuity. With

the appellant's consent, an evidential hearing was held in this appeal by conference telephone on October 19, 1989. OPM did not participate in the hearing proceeding.

For the reasons indicated, the reconsideration decision is AFFIRMED.

JURISDICTION

5 U.S.C. § 8347(d)(1) vests the Board with appellate jurisdiction over this appeal.

ANALYSIS AND FINDINGS

Background

Ralph J. Farris retired on January 16, 1981. He was married to Jane Ludwig

Farris at the time of his retirement and he elected an annuity reduced for survivor benefits. Jane Ludwig Farris died in September, 1986. On August 13, 1987, Ralph J. Farris married the appellant. For two years after this post retirement marriage, Ralph J. Farris was eligible to elect a reduction in his annuity to provide a survivor annuity for the appellant. 5 U.S.C. § 833(j)(5)(C)(i). Ralph J. Farris died on March 16, 1989. His death occurred before August 12, 1989, when the two year period for the election ended. Ralph J. Farris did not make a post retirement

election of a survivor annuity for the appellant.

Proceedings before the Office of Personnel Management

The appellant filed a claim for death benefits on March 30, 1989. Appeal File, Tab 10; Agency File, Tab 5. The appellant testified that she spoke with Dorothea Harris, an OPM employee, who advised her that she had been approved for a survivor annuity of $900.00 a month after payment of a $1500.00 deposit. Thelma B. Tabb, an OPM Claims Examiner, telephoned the appellant and advised her that the advice she received from

Dorothea Harris was in error and she would not receive a survivor annuity. On June 23, 1989, Thelma B. Tabb issued the OPM survivor annuity. Appeal File, Tab 10; Agency File, Tab 4. The appellant requested reconsideration. Agency File, Tab 3. On July 24, 1989, OPM issued its reconsideration decision and found that the appellant was not eligible for a survivor annuity based on the Federal service of Ralph J. Farris, Agency File, Tab 2. On August 10, 1989, the appellant filed a second claim for a survivor annuity with OPM, as the personal representative of Ralph J. Farris. OPM

viewed the claim as duplicative and took no action on it. This appeal followed. Appeal File, Tab 1.

Burden of Proof

As the seeker of benefits under the Civil Service Retirement Act, the appellant bears the burden of proof, by the preponderance of the evidence, to show that she is entitled to the benefits sought. E.g., Cheeseman v. Office of Personnel Management, 791 F.2d 138, 141 (Fed. Cir. 1986), cert. denied, 479 U.S. 1037 (1987); Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 415 (1981). Preponderance of the evidence

means that degree of relevant evidence which a reasonable person considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

The appellant is not entitled to a survivor annuity.

The appellant asserts that (1) she is covered by the decedent's election for a survivor annuity that her husband made at retirement; (2) that her husband believed that she was covered under the survivor annuity election made at retirement; (3) that OPM failed in its obligation to give

her husband effective notice of changes in the retirement law; and (4) that she is a proper party to make the post retirement survivor annuity election. Each of these contentions must be rejected.

The appellant entered into evidence, as Appellant's Exhibit A, the election of an annuity with survivor benefits to widow, that Ralph J. Farris made on January 2, 1981, at the time of his retirement. Appeal File, Tab 19. The appellant correctly points out that Ralph J. Farris did not elect a beneficiary of his survivor annuity by name. The appellant

asserts that the survivor annuity attaches to the widow, whomever it may be in the future. The appellant cites Burrell v. Office of Personnel Management, 33 M.S.P.R. 546, 548 (1987), in support of her position. This reliance is misplaced.

It is certainly true that between October 26, 1974 and October 1, 1978, a second wife, acquired after retirement, automatically became entitled to the same survivor benefit the annuitant elected for his first wife at retirement. Employees--Annuity for Surviving Spouse, Pub. L. No. 93-474, 88 Stat. 1438 (1974)

(later amended several times with current version at 5 U.S.C. § 8339(j)(5)(C)(i)). In 1978, Congress amended then 5 U.S.C. §8339(j) to eliminate the automatic survivor annuity for a second wife. That amendment gave the annuitant an option for a one-year period following remarriage to provide a new spouse with a survivor annuity. Survivor Annuity--Reduction-- Election, Pub. L. No. 95-317, 92 Stat. 382 (1978) (then codified at 5 U.S.C. § 8339(j). The Civil Service Retirement Spouse Equity Act of 1984, Pub. L. No. 98-615, 98 Stat. 3195-3207 (1984), effective November 8, 1984, as

amended by the Federal Employee Benefits Improvement Act of 1986, Pub. L. No. 99-251, 100 Stat. 20 (1986), effective February 27, 1986, 5 U.S.C. § 8341 note, changed the time limit for election of benefits for a post retirement spouse from one year to two years. These amendments apply to persons who retire after May 6, 1985, or who, regardless of when retired, married the post retirement spouse after February 27, 1986.

The appellant married Ralph J. Farris on August 13, 1987. Her right to a survivor annuity is governed by 5 U.S.C. §8339(j)(5)(C)(i) and 5 C.F.R. §

831.613(b)(2). Thus, Ralph J. Farris was required to elect a survivor annuity for the appellant in a signed writing received by OPM within two years of the post retirement marriage. I must find in this case that the decedent, Ralph J. Farris, made no such election. The appellant is not entitled to a survivor annuity.

The appellant's contention that the law in effect at the time of her husband's retirement should govern her right to receive a survivor annuity or her husband's election of a survivor annuity made at the time of his retirement should

automatically provide her with a survivor annuity must be rejected as contrary to law.

As noted above, in 1978 Congress eliminated the automatic survivor annuity for a post retirement (second) spouse where a survivor annuity had been elected for the (first) spouse at retirement. Additionally, the two year election period applies to a person who, regardless of when retired, married the post retirement spouse after February 26, 1986. Pub. Law 99-251, Sec. 307(b); 5 U.S.C. § 8339, note. As noted above, the appellant married Ralph J. Farris on

August 13, 1987, after the amendments to the law were effective.

The appellant testified that her husband told her that he had provided for her in the event of his death. He stated that the appellant would receive 55 percent of his civil service annuity and he told her that, "he had taken care of it." Hearing Tape, Side 1. While I am sympathetic to the appellant's plight in this unfortunate circumstance, I have no discretionary authority to waive the statutory requirements. Shelly v. Office of Personnel Management, 6 M.S.P.R. 267, 272 (1981). The right to create a

survivor annuity is not testamentary. It is not property that can be bequeathed by a will or established outside of the statutory procedure. "Entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits...," United States v. Larionoff, 431 U.S. 864, 869 (1977); Zucker v. United States, 758 F.2d 637, 640 (Fed. Cir. 1985). The appellant is not entitled to a survivor annuity by virtue of the decedent's oral representations.

The appellant further asserted that the decedent believed that she was covered

under the survivor annuity election made at retirement and that OPM failed in its obligation to give her husband effective notice of changes in the retirement law.

OPM presented evidence in the form of an affidavit dated February 8, 1989, of James L. Bryson, the Chief of the Administrative Management Branch. Appeal File, Tab 10; Agency File, Tab 6. He states that general notices regarding survivor annuity elections were sent to each and every annuitant on the OPM rolls in December 1986, December 1987, and December 1988. The December 1987 notice contained this language in Section II,

"Survivor Benefits for Spouses Married After Retirement and Former Spouses A. Retirees Whose Annuity Began Before May 7, 1985":

> If your annuity commenced before May 7, 1985, and you married or remarried on or after February 27, 1986, you may provide your spouse with a survivor annuity by filing a written election with OPM within two years of the date of your marriage. You will have to accept a reduction in your annuity and also pay a deposit equaling the difference between (1) the annuity paid to you since your retirement and (2) the lower annuity that would have been paid if your new election had always been in effect. Interest will be charged on the deposit.

Id. The December 1988 notice contained identical language. I find these notices

to be effective and I further find that OPM has shown that it provided the appellant's decedent with the required notice of his right to make an election to provide a survivor annuity for his post retirement spouse. The appellant has not shown that a timely election was made or that a waiver should be granted. See, Darsigny v. Office of Personnel Management, 787 F2d 1555, 1557 (Fed. Cir. 1986).

The appellant's final contention is that she is a proper party to make the post retirement survivor annuity election either on her own behalf or as the

personal representative of her deceased husband. The right to make a post retirement survivor annuity election is a personal right of the retiree which must be exercised by him during his lifetime. Thus, the right of Ralph J. Farris to make an election expired on March 16, 1989, upon his death. His surviving spouse cannot make the election herself either on her own behalf or as the decedent's personal representative. See, Darsigny, 787 F.2d at 1558.

Despite the sympathetic nature of the appellant's case, I must find that the appellant is not entitled to a survivor

annuity based on the federal service of Ralph J. Farris.

DECISION

The OPM reconsideration decision is AFFIRMED.

FOR THE BOARD:

[Signed] William F. Curtin
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 12, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own

motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this

initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or

hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30

calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Zetta C. Farris
457 Ingal Blvd.
Salem, VA 24153

Appellant's Representative

Gary M. Bowman, Esquire
Martin, Hopkins, Lemon & Carter, P.C.
P.O. Box 13366
Roanoke, VA 24033-3366

Agency Representative

Connie E. Torillo
Retirement Policy Division
Office of Retirement and Insurance Policy
Retirement and Insurance Group
U.S. Office of Personnel Management
P.O. Box 16
Washington, D.C. 20044

OPM's Employee Relations Division

Mr. Timothy M. Dirks, Chief
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7623
Washington, D.C. 20415

Date: November 13, 1989

Rose R. Moran
Legal Technician

OFFICE OF PERSONNEL MANAGEMENT
Washington, D.C. 20415

In Resp. Refer To Your Reference
JUL 23

Mrs. Zetta C. Farris CF
1826306
457 Ingal Blvd.
Salem, Va. 24153

Dear Mrs. Farris:

This refers to your application for benefits due to the death of Ralph J. Farris, a retired Federal employee who died on March 15, 1989.

Under the retirement law, an employee who is married at retirement and elects a reduced annuity to provide survivor benefits to his/her spouse, may have the reduction eliminated if the marriage later terminates. If the retired employee later remarries, he or she may elect survivor benefits for the newly

acquired spouse so long as he or she notifies us, in writing, within 2 year of the date of the remarriage.

We have no record the Mr. Farris notified this office, in writing, to elect survivor benefits within 2 year of your marriage. Therefore, we must disallow your application for survivor annuity.

If you feel our action to disallow your application for benefits is improper, you may request reconsideration of our decision. The enclosed form 9RI 46-46 (Request for Reconsideration) explain how to make this request.

Sincerely,

Thelma B. Tabb
Claims examiner
Annuitants Service
Division

OFFICE OF
PERSONNEL MANAGEMENT
Washington, D.C. 20415

In Resp. Refer To Your Reference

JUL 24, 1989

CRR:BJ:1t CSF 1 82

Ralph J. F.

Zetta C. Farris
457 Ingal Blvd.
Salem, Va. 24153

Dear Mrs. Farris:

This is in reply to your June 29, 1989 request for reconsideration of the initial decision that you are not eligible for survivor annuity benefits based on the Federal service of your late spouse, Mr. Ralph J. Farris.

BACKGROUND

The record shows that your husband retired under the Civil Service Retirement law on January 16, 1981. At that time he was married and elected an annuity reduced for survivor benefits. That marriage ended and you and your husband were married on August 13, 1987. For two years thereafter, Mr. Farris was eligible to elect a reduction in an annuity in order to provide survivor benefits for you. The time within which he could have filed for survivorship reduction in his annuity would have ended on August 12, 1989. However, he died on March 16, 1989. Our records do not indicate that a written election of survivor benefits was received on or before that date. Therefore, it was determined that you are not entitled to survivor annuity benefits.

ANALYSIS AND FINDINGS

The Office of Personnel Management is charged with the administration of the

Civil Service Retirement law and is expected to pay benefits only as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits. The law that applies in your case is:

> Section 8339(j)(5)(C)(i) of title 5, United States Code which at the time of your marriage states in pertinent part:
>
> (C)(i) Upon remarriage, a retired employee or Member who was married at the time of retirement. . . .may irrevocably elect during such marriage, in a signed writing received by the Office within 2 years after such remarriage. . . .a reduction in the employee or Member's annuity under paragraph (4) of this subsection for the purpose of providing an annuity for such employee or Member's spouse in the event such spouse survives the employee or Member.

Thus, the law allows certain retired employees who were married when they

retired to take a reduction in annuity in order to provide a survivor annuity for a spouse acquired after retirement. The law as applicable in your case specifically states, however, that the signed writing must be received in the Office of Personnel Management within two years after the remarriage.

Beginning in October 1978, the Office of Personnel Management has periodically mailed general notices to all annuitants on the civil service annuity rolls to advise them of the provisions of law governing the election of survivor annuity benefits and the time limit for making survivor elections. During the two-year period following your marriage on August 13, 1987, your husband was sent such a notice in December 1987 and December, 1988. We have carefully reviewed our records and we do not find that your late spouse submitted a timely election of survivor annuity benefits for you.

APPEAL RIGHTS

In view of the above, the decision of

June 23, 1989 is affirmed. This constitutes the final decision of the Office of Personnel Management in this matter. You have the right to appeal this decision to the Merit Systems Protection Board. The enclosed sheet provides filing instructions. Please note the twenty-five (25) day time limit for filing an appeal.

Sincerely,

William C. Jackson, Chief
Reconsideration and Debt
Collection Division

Enclosure

cc: Honorable Jim Olin